IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 42 of 2006
With
CIVIL APPLICATION No. 2918 of 2006
In
APPEAL FROM ORDER No. 42 of 2006
With
CIVIL APPLICATION No. 4438 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KHIMJIBHAI HARJIVANBHAI PATADIA
Versus
PATEL GOVINDBHAI BHAGVANBHAI AND OTHERS

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Appearance :
MR PC KAVINA with MR DC SEJPAL for Appellant.
MR SN THAKKAR for Respondent Nos.1 - 8.
MR KG VAKHARIA with MK VAKHARIA for Respondent No.1.
RULE SERVED for Respondent Nos.9 - 10,12 - 21.
RULE UNSERVED for Respondent No.11.
MS AVNI MEHTA for Respondent No.22.
MR PREMAL JOSHI for respondent Nos.23-24.

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CORAM : HONOURABLE MR. JUSTICE P.B.MAJMUDAR

Date : 01/12/2006

ORAL JUDGMENT

The ingenuity of the appellant in pursuing the frivolous litigation is remarkable. After entering into so-called agreement as back as in February 1992, the plaintiff had guts to approach the Court after more than 13 years by taking out frivolous and unsustainable proceedings by filing a suit for specific performance. The facts of the case will reveal as to how the plaintiff has tried to take advantage of the situation in order to take away the property of one of the defendants, namely, Govindbhai Bhagvanbhai Patel and how the plaintiff has made a feeble attempt to get the said property by filing a suit for specific performance of the agreement.

The appellant is the original plaintiff of Special Civil Suit No.53/2005. The said suit is filed for getting decree for specific performance on the basis of an agreement to sale dated 23-2-1992, which according to the plaintiff is executed by the original owner of the land, namely, Patel Govindbhai Bhagvanbhai, who is defendant no.1 in the said suit. The case of the plaintiff is that on the basis of the said agreement, he has paid part consideration to defendant no.1. As the averment made in paragraph 1 of the plaint, the plaintiff is staying at Mumbai and doing the business of developers in the name of Sweet Home Developers and is involved in the business of purchasing and selling the land. It is the case of the plaintiff that the property as mentioned in paragraph 2 of the plaint is an agricultural land and defendant no.1, Govindbhai Bhagvanbhai Sakhia had agreed to sell the aforesaid land to him for which an agreement was executed by said Govindbhai in his favour on 23rd February, 1992. The sale consideration was fixed at Rs.51 Lacs and since the land was subjected to Urban Land

Ceiling Act, the sale deed was to be executed after the land was released from ULC Act. Some litigations in connection with the suit land were also pending and as per the agreement defendant no.1 – original owner was required to take proceedings to see that the land is cleared from the litigations and after getting the marketable title, the sale deed is to be executed in favour of the plaintiff. According to the plaintiff, the land was thereafter released from ULC and the litigations in connection with the land were also over. However, thereafter, the plaintiff came to know from a public noticed published in daily newspaper "Akila" dated 05.03.2005, that one Rajeshkumar Jayantilal Faldu - respondent no. 24 herein wanted to purchase the said land from one Prafulbhai Govindbhai Raninga. At that time, the plaintiff realized that there is an agreement to sell in his favour and that is why he gave reply to the public notice and, ultimately, approached the Court by filing suit for specific performance in connection with his agreement dated 23-2-1992. The said suit is filed on 13-6-2005 for specific performance of the said agreement of 1991. The plaintiff has joined other defendants also, who have purchased part of the disputed land and it is prayed that decree for specific performance may be granted in connection with agreement as the plaintiff is ready and willing to perform his part of the contract in connection with the agreement dated 23-2-1992. It is also prayed that it may be held that said agreement to sell is already in existence. It is prayed that whatever sell transactions have taken place subsequently by way of sale deed may be held to be illegal. In interim injunction application, it is prayed that defendants may be restrained from transferring, alienating the suit property during the pendency of the suit.

The aforesaid suit is resisted by defendants on various grounds. It is the say of the defendants that the suit is frivolous and not maintainable. So far as original defendant no.1-Govindbhai as well as

defendant no.22 are concerned, in their written statement they have pointed out that after the aforesaid agreement dated 23-2-1992, another agreement was entered into by defendant no.1 – Govindbhai in favour of defendant no.22 – Chhaganbhai Jivabhai Khunt and that the plaintiff is signatory to said agreement dated 18th August, 1992. As per the said agreement, original owner has decided to sell the aforesaid land to defendant No.22 and plaintiff is also a signatory at the time when the said agreement was executed. It is pointed out by the defendants that this fact has been suppressed by the plaintiff and, therefore, he is not entitled to any equitable relief for injunction under Order 39 of C.P.C. The original defendants no.2, 21 and 23 have filed their written statement at Exh.38 to the injunction application. It is pointed out that even on the basis of so-called agreement in favour of the plaintiff, within six months the plaintiff was required to pay remaining consideration which he has not paid. As per the said agreement 7 Acre and 9 Gunthas of land was agreed to be sold, as against that the authority under the ULC Act has only released 13,500 sq.mtr. of land and in view of that the plaintiff was not willing to perform his part of the contract and that is how he is a signatory to the agreement wherein the original owner has decided to sell the land to defendant no.22 – Chhaganbhai Jivabhai Khunt. The defendants also stated that the amount of Rs.25 Lacs as claimed to have been paid by the plaintiff to the defendant is not correct and he had not paid any amount nor there is any evidence produced regarding such payment.

On this and other grounds, interim injunction application is resisted by the concerned defendants.

After considering the material on record as well as after considering the arguments of both the sides, learned trial Judge came to

the conclusion that the plaintiff has failed to prove his prima facie case. Accordingly, learned trial Judge has rejected the application for interim injunction against which the original plaintiff has preferred this Appeal from Order under Order 43 of the Civil Procedure Code.

Mr.Kavina, learned advocate appearing for the appellant vehemently submitted that the learned trial Judge has erred in rejecting the injunction application by coming to the conclusion that by entering into subsequent agreement in favour of defendant no.22 Mr.Chhaganbhai Jivabhai Khunt, in which the plaintiff has signed as a confirming party, a new contract has been arrived at by which the property in question was agreed to be sold to defendant no.22. It is submitted that the learned trial Judge has erred in relying upon the principle of novatio. He also submitted that the plaintiff had in fact paid Rs.25 Lacs to defendant no.1. Mr.Kavina further submitted that the trial Court has erred in coming to the conclusion that the suit is time barred and the plaintiff has filed it within three years, as considering the recitals in the agreement to sell dated 23-2-1992, after the property being released from ULC and after the litigations, which were pending were over, sale deed was required to be executed. He frankly admitted that there is nothing to show that even when the earlier suit was over, why his client had remained silent for more than two years. He, however, submitted that the suit, which was referred in the agreement dated 23-2-1992, was disposed of on 24-12-2004 and the present suit is filed on 13-6-2005. It is submitted by Mr.Kavina that in any case, when the suit for specific performance is filed, for whatever worth it is, if the injunction is not granted such suit may become infructuous, and, therefore, once the suit is filed the Court must protect the immovable property by granting injunction. Mr.Kavina has also submitted written submissions giving factual details of the case. It is submitted by Mr.Kavina that on 5-3-2005,

when a public notice was given by defendant no.24, namely Rajesh Jayantilal Faldu, wherein it was stated that he wanted to purchase the property from the original owner, Govindbhai, that prompted his client to file the present suit for specific performance. In the written submissions, it is averred that as per the agreement in favour of the plaintiff, defendant no.1 was required to perform the contract by executing the sale deed and on 10th March, 2005 when the plaintiff raised objection and gave reply to the public notice through his advocate cause of action for filing the suit arose. It is pointed out that defendant no.1 and his power of attorney holder executed 13 sale deed in favour of other defendants who are members of one family and related to defendant no.1 and his power of attorney holders.

It is submitted by Mr.Kavina that in any case, the learned Judge had erred in coming to the conclusion that there is a novatio between the parties and the original contract dated 23-2-1992 is altered, which is in favour of his client. He submitted that agreement dated 18-8-1992 is between defendant no.1 and defendant no.22 and the plaintiff has singed only as a witness and he is not a party to said contract, therefore, there is no existence of novatio. He submitted that as per Section 62 of the Contract Act, novatio, rescission or alteration of the contract can only done with the agreement of both the parties of a contract, and both the parties have agreed to substitute old contract with a new contract or rescind or alter the same, for which he has relied upon decision of the Supreme Court in **City Bank Vs. Standard Chartered Bank** reported in **(2003) SC 4630**. As per the written arguments, the irrevocable power of attorney which was executed in favour of the plaintiff is still in existence even as on today and it is not cancelled and that the plaintiff has already parted with Rs.25 Lacs at the time executing the sale deed and the remaining amount of contract is only Rs.20,50,000/- which the plaintiff

is ready and willing to pay.

On the other hand, Mr.Vakharia, learned advocate appearing for the respondent submitted that the present suit is nothing but abuse of process of law and it is absolutely frivolous. He further submitted that the plaintiff has filed the suit only with a view to take a chance in the matter of immovable property. It is submitted by Mr.Vakharia that the plaintiff, who himself is a signatory to an agreement/document dated 18-8-1992 has given up his right in the suit land as the original agreement itself was a speculative one and he having came to know that the ULC authority has not released the entire land, for which the agreement was entered into on 23-2-1992, ultimately, the plaintiff gave up his right by signing aforesaid agreement dated 18-8-1992. Mr.Vakharia further submitted that the plaintiff has not mentioned aforesaid fact in his plaint and injunction application that he is signatory to aforesaid agreement and, therefore, he was not entitled to equitable relief of injunction under Order 39 of C.P.C. Mr.Vakharia further submitted that the agreement on the basis of which the suit is filed by the plaintiff is dated 23-2-1992, as against that the suit is filed in 2005. It is submitted by Mr.Vakharia that looking to the suit agreement and recital of the same, the suit is time barred, as the same was required to be filed within a period of three years from the suit agreement. He also submitted that on that ground, the suit is required to be dismissed and, there is no question of granting any interim injunction as the plaintiff has miserably failed to make out any prima facie case. He also submitted that the plaintiff has produced a forged and concocted receipt, which is at page 36 in the paper book. He further stated that said receipt is a xerox copy of the original and there is a so-called thumb impression of defendant no.1 on it and it is stated that defendant no.1 has received Rs.25 Lacs from the present appellant on 20-9-1992. He submitted that

this is a forged receipt and it is on the stamp paper of Rs.10/- which was purchased on 21-2-1992, and the date of receipt is shown as 20-9-1992. He further submitted that the original copy of this receipt is not produced by the plaintiff-appellant. It is submitted by Mr.Vakharia that his client has already taken proceedings under the criminal law for forgery against the plaintiff. He further submitted that as per the original agreement dated 23-2-1992, on which the reliance is placed by the plaintiff, the total area mentioned is 7 Acres and 9 Gunthas, however, the ULC authority has not released the entire land and only 13,500 sq.mtr. of the land is released and the original owner is held to be the owner of only 13,500 sq.mtr. of land and, therefore, the agreement to sell cannot be executed for the entire land. Mr.Vakharia also submitted that said agreement cannot be split up and, therefore, specific performance of such agreement can never be granted, as it is not in dispute that the total land for which the agreement was execute has not been released by the ULC authority. He accordingly submitted that the plaintiff has filed absolutely frivolous suit.

I have heard both the learned advocates in detail and I have gone through the documentary evidence on record. I have also considered the written submissions of the parties. In my view, the suit filed by the plaintiff is prima facie not sustainable and with some ulterior motive or object the suit is filed. It is required to be noted that as per the agreement dated 23-2-1992 (on which the plaintiff has placed reliance) original defendant no.1 has agreed to sell 7 acres and 9 gunthas of land and on the date of executing the said document, the plaintiff had paid Rs.50,000/- to defendant no.1. As per the recital of said agreement, the plaintiff was required to take care of the ULC proceedings and the original owner defendant no.1 was to take appropriate proceedings for cancelling earlier transaction, which he had undertaken in connection

with the land in question. As per the recital of the said agreement, the plaintiff was required to pay Rs.5 Lacs to defendant no.1 between 24-2-1992 to 20-3-1992. It is provided in the said agreement that after the land is released by ULC authority, amount of Rs.25 Lacs was to be paid immediately and, thereafter, Rs.21 Lacs was required to be paid within a period of four months after the land is released from ULC. In view of the same, it is clear that Rs.20 lakhs was required to be paid immediately on the land being released from ULC and the remaining amount of Rs.21 lakhs was to be paid within 4 months thereafter. It is, therefore, clear that as per the agreement in question, Rs.46 lakhs were required to be paid by the plaintiff to the defendant No.1 within 4 months after the land is released from ULC.

As per the receipt, on which the reliance is placed by the plaintiff, Rs.25 Lacs were paid by the plaintiff to defendant no.1- Govindbhai Bhagvanbhai Sakhia, however, said receipt is seriously disputed. It is an admitted fact that the ULC proceedings were terminated on 18-7-1992, thereafter, the plaintiff has never tried to pursue defendant no.1 to act further in accordance with agreement to sell nor he has even tried to pay the remaining amount of Rs.21 Lacs, even if it is presumed that he had paid Rs.25 Lacs (as is claimed by the plaintiff, by relying upon a disputed receipt given by defendant no.1). It is also interesting to note that even some suits, which were pending in connection with the land in question about which reference is also made in the aforesaid agreement dated 23-2-1992, such suits have also been disposed of in December, 2004. Even, thereafter, the plaintiff has never tried to pursue his agreement, not only that till he filed the suit in question, he has never asked defendant no.1 to execute the sale deed by accepting the remaining part consideration. It is only after the public notice issued by the purchaser that the plaintiff was prompted to file the present suit, and

prior to filing of the said suit, the plaintiff entered into correspondence by exchanging notices in connection with the land in question. It is required to be noted that immediately after entering into agreement dated 23-2-1992, the plaintiff had signed another agreement with original land owner where the original owner wanted to sell away land to defendant no.22 and, therefore, even if it is held that it may not amount to novatio or new contract, at least, it can safely be presumed that the plaintiff has given up his right in the land in question. Not only that the subsequent conduct of the plaintiff by which he has not even written a single letter for all these years would clearly indicate that no right is available in his favour in the disputed land.

Mr.Kavina is also not in a position to point out that till the public notice was issued, whether his client had ever tried to enter into any correspondence with defendant no.1 or has ever tried to pursue his contractual rights in any manner. Even when the factum about payment of Rs.25 Lacs is seriously disputed by defendant no.1 on the ground that a forged thumb impression is taken on a stamp paper, the plaintiff has not even produced prima facie evidence to show as to in which manner he has paid Rs.25 Lacs. The plaintiff has not produced anything to show that whether he has withdrawn said amount from any bank account or he has borrowed money from anyone. Mr.Kavina is also not in a position to point out as to in which manner, his client has paid the aforesaid amount and even if it is paid by cash, no corresponding documentary evidence in the form of income tax return is finding place on record in connection with such payment. Therefore, it can safely be presumed that the theory of so-called payment is not at all believable.

Even otherwise, as discussed earlier, when the agreement to sell was in connection with a particular area, i.e., 7 acres and 9 gunthas and

when the entire area is not released by ULC authority, the agreement cannot be splitted and no decree for specific performance can be granted for the land in question for which agreement to sell is entered into.

At this stage, Article 54 of the Limitation Act is required to be considered, which provides as under :

	Description of the suit	*Period of limitation*	*Time from which period begins to run*
54.	*For specific performance of a contract.*	*Three years*	*The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.*

In the instant case, as per the agreement dated 23-2-1992, admittedly, the plaintiff has not paid the consideration as provided in the said agreement as it was required to be paid within four months from the date the land being released from ULC. Mr.Kavina, however, submitted that since litigation was pending, his client was not obliged to make the payment. However, reading the document in question, it is clear that the suit amount was to be paid immediately on the termination of ULC proceedings, which is admittedly not done, therefore, when the plaintiff has not shown his readiness or willingness to perform his part of contract, and when he signed another agreement in August, 1992, it prima facie indicates that the plaintiff has given up his right in the suit property. The plaintiff has never tried to follow up the aforesaid agreement and, ultimately, when some public notice is issued by

defendant no.24, with some oblique motive the plaintiff has instituted the suit in question.

Considering the aforesaid aspect of the matter, in my view, the trial Court was perfectly justified in refusing to grant discretionary order of injunction under Order 39 of C.P.C. The facts of the case would indicate that the plaintiff has filed the suit only with a view to blackmail the defendants or bona fide purchasers, as part of the land is now allotted to various purchasers by plotting the same. At this stage, Mr.Kavina submitted that, at least, for part of the land injunction may be granted, however, this is not a case in which any discretionary order under Order 39 of C.P.C., can be granted to assist such plaintiff, who has instituted the suit absolutely without any basis and only with an object to get something out of nothing.

Such type of litigation is required to be curbed, as it is noticed by the Court that in cities like Ahmedabad, Surat and Rajkot the land brokers are entering into such transactions every day. It is also required to be noted that in Appeal under Order 43 of C.P.C., this Court would not like to interfere with the discretionary order passed by the trial Court unless it is found that the discretion exercised by the Court is not based on evidence on record or the order is passed contrary to the settled legal position in this behalf reference is required to be made to the decision of this Court in **Mardia Chemicals Limited v. Gujarat Electricity Board & Anr.**, reported in **2002 (2) GLR 1480**, wherein it is held that discretion exercised by the trial Court in the matter of interim injunction, normally is not required to be interfered with by the appellate Court unless the order is perverse or is passed against the settled principles of law.

Under these circumstances, I do not find any substance in this

appeal. However, Mr.Kavina submitted that if the injunction is not granted, the suit may become infructuous and, therefore, at least the land in question is required to be protected from transfer or sell by granting injunction. In my view, looking to the facts and circumstances of the case as well as the history of the case, as narrated in this judgement, this is not a case in which this Court would like to assist the plaintiff in any manner by granting interim order of injunction. Ultimately, in case the suit is decreed, it is always open for the concerned Court before whom the suit is pending, to pass necessary consequential orders and whatever transaction, which might have taken place, can always be subject to the result of the proceedings.

Considering the aforesaid aspects of the matter, I do not find any substance in this Appeal from Order, hence, it is dismissed. The appellant is directed to pay cost of Rs.50,000/- to defendant no.1. The amount of cost to be deposited before the trial Court within a period of one month from today and on such deposit, defendant no.1 will be entitled to withdraw the same unconditionally.

Mr.Kavina at this stage requested that the order in question may be stayed for some time. However, there was no interim order which is in force as on today. Even while admitting the appeal, the Court has not granted any interim order. Therefore, there is no question of continuing any interim relief for a particular period.

In view of above order, no order on Civil Application Nos. 2918 of 2006 and 4438 of 2006 and both the Civil Applications are disposed of accordingly.

(P.B.Majmudar, J.)

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